Supreme Court, U.S.
FILED
NOV 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 88-1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

LLOYD PERKINS,
Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois For The Fifth Judicial District

BRIEF FOR *AMICI CURIAE* THE LINCOLN LEGAL FOUNDATION; LIVINGSTON COUNTY, ILLINOIS; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION; THE ILLINOIS SHERIFFS ASSOCIATION; AND THE ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS

JOSEPH A. MORRIS,
The Lincoln Legal Foundation,
100 West Monroe Street,
Suite 1600,
Chicago, Illinois 60603,
(312) 606-0951,
Counsel of Record for Amici.

(Additional Counsel listed on inside front cover)

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

26pp

(Additional Counsel for Amici)

DONALD D. BERNARDI,
State's Attorney of Livingston County, Illinois,
Livingston County Courthouse,
Pontiac, Illinois 61764,
(815) 842-1550,

FRED L. FOREMAN,
State's Attorney of Lake County, Illinois, and
Chairman, National District Attorneys Association,
Lake County Courthouse,
Waukegan, Illinois 60085,
(708) 360-6644,

DANIEL M. HARROD,
Counsel to the Illinois Sheriffs Association,
107 East Eureka Street,
Eureka, Illinois 61530,
(309) 467-2381,

NANCY W. OWEN,
State's Attorney of Coles County, Illinois, and
President, Illinois State's Attorneys Association,
Coles County Courthouse,
Charleston, Illinois 61920,
(217) 348-0561,

JACK E. YELVERTON,
National District Attorneys Association,
1033 North Fairfax Street,
Alexandria, Virginia 22314,
(703) 549-9222,

Of Counsel.

November 16, 1989.

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
INTERESTS OF *AMICI CURIAE*	2
The Lincoln Legal Foundation	2
Livingston County, Illinois	4
National District Attorneys Association ...	5
Illinois Sheriffs Association	5
Association of State Correctional Administrators	5
STATEMENT	6
ARGUMENT	8
I. THE DECISION OF THE COURT BELOW WOULD EFFECTIVELY PROHIBIT THE NECESSARY AND VALUABLE USE OF UNDERCOVER AGENTS IN PRESERVING ORDER AND IN PREVENTING, DETECTING, INVESTIGATING, AND PROSECUTING CRIME IN PRISONS	9
II. THE COURT BELOW HAS MECHANICALLY APPLIED THE *MIRANDA* RULE TO A SITUATION IN WHICH THERE WAS NO CUSTODIAL POLICE INTERROGATION, NO DANGER OF COERCION, AND NO COMPELLED SELF-INCRIMINATION	13

III.

THE LOWER COURT'S CONFECTION OF A SWEEPING PRIVILEGE AGAINST SELF-INCRIMINATION IN THE SETTING OF NON-INVESTIGATIVE CUSTODY PUTS THE FIFTH AMENDMENT INTO ASYMMETRY WITH THIS COURT'S APPLICATION OF THE FIRST, FOURTH, SIXTH, AND FOURTEENTH AMENDMENTS IN THE SAME SETTING ... 16

CONCLUSION 19

TABLE OF AUTHORITIES

Cases PAGE

Bell v. Wolfish, 441 U.S. 520 (1979) 17
Block v. Rutherford, 468 U.S. 576 (1984) 17
Harris v. New York, 401 U.S. 222 (1971) 15
Hudson v. Palmer, 468 U.S. 517 (1984) 16, 17, 18
Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) 16
Kuhlmann v. Wilson, 477 U.S. 436 (1986) 17
Mathis v. United States, 391 U.S. 1 (1968) 14
Michigan v. Tucker, 417 U.S. 433 (1974) 15
Minnesota v. Murphy, 465 U.S. 420 (1985) 15
Miranda v. Arizona, 384 U.S. 436 (1966) .... *passim*
New York v. Quarles, 467 U.S. 649 (1984) 15
O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) .. 17
Oregon v. Elstad, 470 U.S. 248 (1985) 15

Pell v. Procunier, 417 U.S. 817 (1974) 16
People v. Carter, Cir.Ct., 11th Jud.Cir., Ill., No. 87-CF-112 (Feb. 17, 1989) 12
People v. Johnson, Cir.Ct., 11th Jud.Cir., Ill., No. 87-CF-111 (Feb. 17, 1989) 12
People v. Latona, Cir.Ct., 15th Jud.Cir., Ill., No. 89-CF-114 12
People v. Perkins, 176 Ill.App.3d 443, 531 N.E.2d 141, 126 Ill.Dec. 8 (5th Dist. 1988) ..... *passim*
Price v. Johnston, 334 U.S. 266 (1948) 17, 18
Procunier v. Martinez, 416 U.S. 396 (1974) 16
Rhode Island v. Innis, 446 U.S. 291 (1980) 14
Turner v. Safley, 482 U.S. 78 (1987) 17
Wolff v. McDonnell, 418 U.S. 539 (1974) 18

Constitutions

U.S. Const., Amendment I 16, 18
U.S. Const., Amendment IV 16, 18
U.S. Const., Amendment V ..... *passim*
U.S. Const., Amendment VI 17, 18
U.S. Const., Amendment XIV 9, 16, 18
Ill. Const., Art. I, Sec. 11 (1970) 2
Ill. Const., Art. VI, Sec. 19 (1970) 4
Ill. Const. Art. VII (1970) 4

Other Authorities

Camp, CORRECTIONS YEARBOOK 18 (1989) 10

Carriere, *The Dilemma of Individual Violence in Prisons*, 6 NEW ENG. J. ON PRISON L. 198 (1980) 9

Dix, *Undercover Investigations and Police Rule-Making*, 53 TEX.L.REV. 203 (1975) 14

Engel and Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence*, 7 HARV. J. L. & PUB. POL. 413 (1985) 3, 9

Flynn, *Jails and Criminal Justice*, in PRISONERS IN AMERICA (Ohlin ed. 1972) 3

Irwin, *The Changing Social Structure of the Men's Prison*, in CORRECTIONS AND PUNISHMENT (Greenberg ed. 1977) 10

Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 GEORGETOWN L.J. 1 (1978) 14

Lauder, FIGHTING VIOLENT CRIME IN AMERICA (1985) 3

McCleery, *Communication Patterns and Bases of Systems of Authority and Power*, in THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON (Cloward et al. eds. 1960) ... 10

Scacco, RAPE IN PRISON (1975) 3, 10

Sherman and Hawkins, IMPRISONMENT IN AMERICA (1981) 9

Toch, POLICE, PRISONS AND THE PROBLEM OF VIOLENCE (1977) 9

Weiss and Friar, TERROR IN THE PRISONS (1974) . 10

White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH.L.REV. 1209 (1980) 14

No. 88-1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

LLOYD PERKINS,
Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois For The Fifth Judicial District

BRIEF FOR *AMICI CURIAE* THE LINCOLN LEGAL FOUNDATION; LIVINGSTON COUNTY, ILLINOIS; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION; THE ILLINOIS SHERIFFS ASSOCIATION; AND THE ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS

INTRODUCTION

The Lincoln Legal Foundation; Livingston County, Illinois; the National District Attorneys Association; the Illinois Sheriffs Association; and the Association of State Correctional Administrators; as *amici curiae*, submit this brief in support of the Petitioner herein, the People of the State of Illinois. *Amici* respectfully urge this Honorable Court to reverse the decision of the Appellate Court of Illinois in

the case at bar. Neither the United States Constitution nor this Court's holding in *Miranda v. Arizona*, 384 U.S. 436 (1966), commands so absurd a rule as that adopted in this case below. If imposed as a blanket doctrine upon correctional institutions, the lower court's reading of the Fifth Amendment would significantly impair the ability of prison administrators to maintain order within their institutions and to investigate crimes occurring behind bars.

INTERESTS OF *AMICI CURIAE*

The Lincoln Legal Foundation

The Lincoln Legal Foundation ("LLF") is a national, nonprofit, nonpartisan, public-interest law center which undertakes litigation, administrative proceedings, legal studies, and educational activities in matters promoting political, economic, and civil liberties; preserving constitutional government, including the separation and limitation of governmental powers; and defending the rights of innocent victims of crime.

LLF has a deep interest in the American criminal justice system and works to enhance its fairness and efficiency. LLF is concerned that American prisons and other correctional facilities be operated so as to serve the objectives of moral instruction, inculcation of respect for legitimate authority, and personal rehabilitation that are among the goals of imprisonment of persons convicted of serious crimes.[1] Absent those characteristics, prisons become, at

[1] The Illinois Constitution, for example, commands that "All penalties shall be determined . . . with the objective of restoring the offender to useful citizenship." Ill. Const., Art. I, Sec. 11 (1970).

best, expensive holding pens in which criminals take sabbaticals from careers in crime. At worst, they degenerate into graduate schools of crime as, crowded together and inadequately controlled, inmates prey upon each other, hardening their hatred and contempt of society, and honing their criminal skills.[2] Prisons should be communities, not where violent crimes are commonplace, but where—thanks to the regulation of inmate conduct and the fostering of discipline that custodial conditions allow—the commission of serious crimes is much less likely than in society at large. Anything else would defeat the purpose of correction and undermine the criminal justice system as a whole.

Inmates desirous of rehabilitating themselves thus share with the broad mass of innocent taxpayers a profound interest in seeing to it that extraordinary conditions of order and discipline prevail in correctional institutions. Federal and State taxpayers across the land will invest enormous sums over the course of the next few years to

[2] One set of commentators have described the problem as follows:

> "Jails, where there is a 'commingling of petty offenders with felons; first offenders with recidivists; and young, impressionable offenders with hard-core, predatory criminals,' have experienced especially high levels of prisoner brutality. Over half the American jail population has not been convicted or tried. These people often are either 'educated in the ways of more serious crimes by those with whom they must share their quarters or . . . are subjected to sexual assault by the more aggressive inmates.'
>
> "Rape is a principal form of domination in prison."

Engel and Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence*, 7 HARV. J. L. & PUB. POL. 413, 415 (1985), citing Flynn, *Jails and Criminal Justice*, in PRISONERS IN AMERICA 49, 57 (Ohlin ed. 1972); and Scacco, RAPE IN PRISON at 100 (1975). The problem increasingly commands the attention of the general public, and is noted by political leaders. *See* Lauder, FIGHTING VIOLENT CRIME IN AMERICA 127 (1985).

build new facilities for the housing and correction of our nation's rising population of convicted criminals. Correctional facilities that are doomed *not* to correct work a fraud upon the American people. LLF seeks, therefore, to voice the public's interest in opposing the imposition upon prison administrations of judicial rules that, while safeguarding no civil liberty, frustrate penological objectives.

Livingston County, Illinois

The County of Livingston is a political subdivision of, and a body politic within, the State of Illinois. It is established, and derives its corporate powers, pursuant to Article VII of the Illinois Constitution (1970). It is represented by its State's attorney, a constitutional officer of the State of Illinois chosen by the electors of the county pursuant to Article VI, Section 19 of the Illinois Constitution (1970). The State's attorney is both civil counsel to the county and the prosecutor of crimes that occur within it.

Livingston County's population numbers approximately 40,000. Located 100 miles southwest of Chicago, it is home to the Pontiac Correctional Center, a prison operated by the Department of Corrections of the State of Illinois. The Pontiac prison is one of Illinois's larger and more secure correctional facilities, housing about 1,950 inmates, all of whom are adult males convicted of serious crimes. When crimes are committed at the Pontiac prison, it is the responsibility of Livingston County to investigate and prosecute them. This results in a not insubstantial burden upon the county's courts, sheriff, and State's attorney, and upon its taxpayers.

National District Attorneys Association

The National District Attorneys Association i. a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens.

Illinois Sheriffs Association

The Illinois Sheriffs Association's membership comprises the 102 county sheriffs of the State of Illinois as well as 25,000 private individuals. The Association was organized to promote and extend assistance to county sheriffs by providing training seminars, scholarships, and educational and various other community services.

Association of State Correctional Administrators

The Association of State Correctional Administrators ("ASCA") is a professional association whose membership consists of the directors of the fifty State departments of corrections, the Federal Bureau of Prisons, and the correctional systems of the District of Columbia, the Commonwealth of Puerto Rico, Cook County, Illinois, the City of New York, New York, and the City and County of Philadelphia, Pennsylvania. ASCA is concerned that, if the holding in *Perkins* is not reversed, there will be grave, far-reaching consequences for the ability of correctional administrators to manage our nation's prisons safely and effectively.

STATEMENT

The facts of this case, as found by the courts below, are set out by the Appellate Court of Illinois in its reported decision, *People v. Perkins*, 176 Ill.App.3d 443, 444-446, 531 N.E.2d 141, 142-143, 126 Ill.Dec. 8, 9-10 (5th Dist. 1988). The salient points are these: Respondent Perkins, while serving a prison term for a crime unrelated to the murder at issue here, confided in a fellow inmate that he had killed a man, and he described the event in considerable detail. The fellow inmate—believing that "people should not kill people"—reported Perkins's confession to authorities. The confession as reported rang true; the details corresponded to the knowledge that the police had of the crime, and their nature was such that it was unlikely that they could have been known to someone who was not, in fact, the killer. To nail down the case the authorities asked the inmate-informant—who was not compensated in any way for his cooperation—to return to Perkins, this time accompanied by a law enforcement officer under cover as a friend and fellow prisoner. They were to seek repetition of the incriminating admissions. As it turned out, by the time of the reunion Perkins was housed in a county jail, awaiting trial on yet a third, completely unrelated charge. When the inmate-informant and the undercover agent encountered Perkins and began chatting with him, they did *not* read him his "*Miranda* rights". Perkins, prodded to discuss the murder by a means no more coercive than being asked if he had ever "done someone", proceeded with apparent alacrity and in great detail to recount the facts of the killing. An indictment followed.

The trial court granted Perkins's motion to suppress the evidence of his statements to the inmate-informant and the undercover officer. The Appellate Court of Illinois affirmed, declaring that "[w]e cannot permit police to subvert the defendant's fifth amendment right against self-incrimination by questioning the defendant, through informants and *while he was in custody*, without first warning him of his rights pursuant to *Miranda*." *Perkins*, *supra*, 176 Ill.App.3d at 450, 531 N.E.2d at 146, 126 Ill.Dec. at 13 (*emphasis added*).

That Perkins was "interrogated" while "in custody" appears to have been central to the Appellate Court's reasoning. As it evaluated the facts of the case, it emphasized its view that "although the defendant was incarcerated on other charges at the time [the inmate-informant and the undercover officer] elicited the incriminating statements, he was 'in custody' for purposes of *Miranda*." *Perkins*, *supra*, 176 Ill.App.3d at 447, 531 N.E.2d at 144, 126 Ill.Dec. at 10. The Appellate Court also held that *Perkins* conversation with the inmate-informant and the undercover officer amounted to prosecutorial interrogation under *Miranda*. *Ibid.*

Amici submit that the Appellate Court's error lay in its understanding of "interrogation" and "custody" within the framework of *Miranda*. It is a mistake that, if perpetuated, will do grave injury to the American penal system.

ARGUMENT

It is clear that Perkins's self-incriminating statements were thoroughly voluntary. They were altogether unforced, and were made in an environment that was entirely free of coercion. Perkins had not been accused of the murder and had no reason to believe that he was suspected of it. He did not believe that he was speaking with representatives of authority or even with persons in superior positions of any kind. He was under no illusions that the statements he made were protected by any privilege.[3]

To the contrary, Perkins knew that his conversations with the inmate-informant and the undercover officer were unprotected. Indeed, Perkins thought that the discussions were themselves part of a criminal enterprise; he was under the impression that he had joined a three-member conspiracy to break out of jail. Perkins had puffed that the jail was "rinky-dink" and that he "could arrange to have someone smuggle in a gun." *Perkins*, *supra*, 176 Ill.App.3d at 445, 531 N.E.2d at 143, 126 Ill.Dec. at 10. Perkins made his incriminating statements during a surreptitious, late-night rendezvous held in the jailhouse "after the other inmates went to sleep." *Ibid.* Seen in this light, Perkins's utterances regarding the murder were decidedly *not* a "confession" elicited under any kind of interrogation. They were, instead, the words of a braggart seeking to impress fellow inmates—in this instance, potential criminal confederates; on another day, perhaps potential cellblock victims or jail-gang followers—with his

[3] There is no suggestion that he was tricked into believing that he was discussing his history with, for example, an attorney retained to represent him.

fierceness, brutality, and willingness to go to any lengths to achieve an end that he desired.

The Appellate Court of Illinois believed that "pressures of interrogation", 176 Ill.App.3d at 449, 531 N.E.2d at 145, 126 Ill.Dec. at 11, inhere in "custodial questioning", irrespective of the context of the custody in which the questioning takes place. That is a misreading of the teaching of *Miranda* to which the facts of Perkins's case give the lie. The nature of the custodial circumstances in which inculpatory admissions are made is crucial to a sound assessment of the constitutional groundrules that control their use as evidence. Custody of a non-investigative kind, in which prisoners are held awaiting trial or while serving sentences, is as different from the setting of custody immediately following arrest as is such interrogative stationhouse custody from normal society. That is a reality that must be taken into account by the courts as they apply the strictures of *Miranda* and of the Self-Incrimination Clauses of the Fifth and Fourteenth Amendments to the world that is found behind prison walls.

I.

THE DECISION OF THE COURT BELOW WOULD EFFECTIVELY PROHIBIT THE NECESSARY AND VALUABLE USE OF UNDERCOVER AGENTS IN PRESERVING ORDER AND IN PREVENTING, DETECTING, INVESTIGATING, AND PROSECUTING CRIME IN PRISONS.

Violence among prisoners is pandemic in men's prisons in contemporary America.[4] It is the prevalent method of

[4] *See* Engel and Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence*, 7 HARV. J. L. & PUB. POL. 413 (1985); Sherman and Hawkins, IMPRISONMENT IN AMERICA (1981); Carriere, *The Dilemma of Individual Violence in Prisons*, 6 NEW ENG. J. ON PRISON L. 198 (1980); Toch, POLICE, PRISONS AND THE PROBLEM OF VIOLENCE (1977).

asserting and establishing masculinity within prison society.[5] It is also a major factor in the arrangement and rearrangement of a prison's internal structure of authority.[6] Against this background, violence directed against—and particularly the murder of—correctional employees represents the highest level of danger in correctional systems. In 1988, a total of 18,934 assaults were reported to have been committed by inmates in Federal and State correctional facilities across America; of these, 1,686 were directed against prison staff and 17,248 were targeted against fellow inmates. Camp, CORRECTIONS YEARBOOK 18 (1989).[7]

While the identities of assailants of both inmates and correctional personnel are frequently known, it is often extremely difficult to obtain evidence that will support prosecution and conviction. Such murders are rarely witnessed by prison staff members or inmates not complicit in the crime. Because of the nature of the environment in which such murders and other crimes of violence are committed, corrections administrators must regularly rely upon assailants to incriminate themselves by communicating to others their involvements in the crimes.

Sometimes such communications are discussions among co-conspirators; at other times they are in the nature of

---

[5] Scacco, RAPE IN PRISON 3 (1975).

[6] Irwin, *The Changing Social Structure of the Men's Prison*, in CORRECTIONS AND PUNISHMENT 21 (Greenberg ed. 1977); McCleery, *Communication Patterns and Bases of Systems of Authority and Power*, in THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON 58 (Cloward et al. eds. 1960).

[7] Without doubt the vast majority of unwitnessed assaults upon prisoners go unreported, as the only safe way for a prisoner to complain about an assault by fellow prisoners is to enter voluntarily into solitary confinement. Weiss and Friar, TERROR IN THE PRISONS 168 (1974).

efforts to bully other inmates into behavior compliant with the perpetrators' wishes; at still other times they may be instances of bragging to impress new inmates with the perpetrators' toughness and their immunity from correctional control. Testimony from another inmate, a visitor, or a person working undercover in a jail or prison is often essential to the successful prosecution of such crimes—and to send clear messages to those who might commit other violent crimes that they will be held accountable for their deeds.

A case precisely on point arises from the Pontiac prison, situated within the jurisdiction of *Amicus* Livingston County, Illinois. On September 3, 1987, within the walls of the Pontiac prison, someone accosted the superintendent, Robert Taylor. Brutally beaten and stabbed ten times, Mr. Taylor died. It fell to the State's attorney of Livingston County to investigate the murder and, if possible, to prosecute those who committed it.

Knowing that a criminal gang had been surreptitiously, but effectively, organized within the prison, and that it saw itself in competition with prison authorities for control of the cellblocks, investigators sought intelligence as to the gang's connections, if any, with the crime. Knowing, too, that the gang owed allegiance to gang chieftains remaining at large on the streets of Chicago, they arranged for an inmate from another prison—thought by gang members to be a loyal gang lieutenant, but in fact a police informant—to visit the Pontiac facility, and while "wired" with a judge's approval to record conversations, to pose as a conduit of information to the gang's outside bosses. In short order, gang leaders within the prison told the informant in detail that they had murdered the superintendent and how they had done so.

A Livingston County grand jury handed up indictments charging the gang leaders who had planned, ordered, and executed the crime with first degree murder, conspiracy to commit murder, and solicitation to commit murder. The indictments were based on the admissions they had made to the informant, and the informant's testimony would have been essential to the prosecution of the case. On February 17, 1989, however, the trial court in that case—the Circuit Court for the Eleventh Judicial Circuit of Illinois, which includes Livingston County—ordered the evidence of the admissions suppressed. *People v. Johnson*, Cir. Ct., 11th Jud. Cir., Ill., No. 87-CF-111 (Feb. 17, 1989); *People v. Carter*, Cir. Ct., 11th Jud. Cir., Ill., No. 87-CF-112 (Feb. 17, 1989). Both cases have been appealed by the State to the Appellate Court of Illinois for the Fourth Judicial District, where they now pend as Nos. 489-181 and 489-182.

In explaining its orders of suppression, the trial court cited the decision of the Appellate Court of Illinois in the instant case as controlling in those cases. Unless the decision below is reversed, therefore, the search for truth in *Johnson* and *Carter* will be frustrated and justice in those cases will be denied. Indeed, unless the decision below is reversed, the people of Illinois and Livingston County will be severely handicapped in their battle for the control of Pontiac prison.[8] That handicap, in turn, will afflict

[8] Pontiac prison's situation is hardly unique. The lower court's decision in *Perkins* is being urged upon an Illinois trial court in a pending case involving allegations of an attempt by an inmate of the Dixon Correctional Center in Illinois to hire a killer to murder his daughter's boyfriend. In that case, *People v. Latona*, Cir. Ct., Lee Co., Ill., No. 89 CF 114, it is alleged that a man serving at the Dixon prison after his conviction on charges unrelated to the killing he sought from behind bars to cause, solicited

(Footnote continued on following page)

every correctional facility in America. The consequences for Americans, within our prisons and without, will be unspeakably tragic.

II.

THE COURT BELOW HAS MECHANICALLY APPLIED THE *MIRANDA* RULE TO A SITUATION IN WHICH THERE WAS NO CUSTODIAL POLICE INTERROGATION, NO DANGER OF COERCION, AND NO COMPELLED SELF-INCRIMINATION.

As the uncontested facts before the Appellate Court of Illinois make clear, the self-incriminating statements which are the subject of this case were voluntarily made by Perkins during an unforced conversation that he had with two men whom he (incorrectly) assumed were simply fellow inmates, and with whom he felt comfortable enough to plan a jail escape. The conversation took place, not in some jailhouse to which Perkins had been forcibly removed for the purpose of interrogation or even trickery, but in the cell block in which Perkins happened to be living. The conversation began and ended in accordance with his wishes. No visible signs of police or other authorities were present. No threats or intimidation were used. No coercion, direct or indirect, physical or psychological, was applied by Perkins's companions or felt by him.

It is plain from these facts that Perkins was not subject to "custodial police interrogation," if those words are to

[8] *continued*
a fellow inmate whom he believed to be a "hit-man" to carry out the murder. The "hit-man" turned out to be an undercover police officer. Talks between the "hit-man" and the convict were recorded electronically with judicial approval. The inmate, invoking the decision below in this case, has moved to suppress the evidence of his statements.

have any meaning which plausibly accords with reality. Nonetheless, in an application of free-floating doctrine unconstrained by facts or the necessity of making distinctions, the lower court managed to hold that Perkins indeed had been subjected to a "custodial police interrogation" requiring the employment of the procedural safeguards outlined in *Miranda*. In order that it arrive at that holding, the court had to cobble together definitions of "custody" and "interrogation" from various of this Court's precedents.[9] Simply adding together these two factors, the lower court apparently reasoned that

CUSTODY + INTERROGATION = *MIRANDA*

and thus arrived at its astonishing result.[10]

This is a gross caricature of the reasoning behind *Miranda*, which was that procedural safeguards—its famous

[9] The Appellate Court seemingly found in *Mathis v. United States*, 391 U.S. 1 (1968), this Court's endorsement of the notion that incarceration of any kind, for any reason, always constitutes "custody" for purposes of *Miranda*. *Perkins*, *supra*, 176 Ill.App.3d at 447, 531 N.E.2d at 144, 126 Ill.Dec. at 11. Similarly, the Appellate Court relied on this Court's opinion in *Rhode Island v. Innis*, 446 U.S. 291 (1980), for the limitless principal that interrogation has occurred whenever the police do or say anything that they should know is reasonably likely to elicit an incriminating response. No other authorities were cited by the Appellate Court as helpful in guiding its analysis on this point.

[10] Astonishing is not an inapt characterization. Three commentators—each generally favorable to a very broad application of the *Miranda* rule—have explicitly addressed the kind of situation presented by *Perkins*. Each has had no difficulty in concluding that *Miranda* would not apply. White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH.L. REV. 1209, 1246-1248 (1980); Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*" 67 GEORGETOWN L.J. 1, 45-69 (1978); Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX.L.REV. 203, 235-6 (1975).

warning—may be necessary as a "practical reinforcement", *Michigan v. Tucker*, 417 U.S. 433, 444 (1974), of an individual's Fifth Amendment rights when he is subjected to "incommunicado interrogation. . . . in a police-dominated atmosphere" that "carries its own badge of intimidation," that "exacts a heavy toll in individual liberty and trades on the weakness of individuals," and that is inherently likely "to subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 445, 457, 455, and 457. Only under these particular conditions is *Miranda's per se* rule held to supplant the "totality of the circumstances" requirement that self-incriminating statements *actually must be shown* to be involuntary. *See, e.g., Minnesota v. Murphy*, 465 U.S. 420 (1984).

Of course, none of these "compelling circumstances" that the *Miranda* rule was created to combat has been shown to exist here. Apparently taking the partial overthrow of the "totality of the circumstances" test literally, the lower court applied *Miranda's per se* rule without undertaking to inquire whether any of the circumstances surrounding the "custody" and "interrogation" in cases of this kind provide reason for *Miranda's* application.

This Court's precedents—especially its more recent decisions—teach that the *Miranda* rule is to be applied flexibly and intelligently, with some sensible regard for whether the rule's application to a particular kind of situation will do anything to advance the rule's policies.[11] In reversing the decision below, this Court ought to make clear that the retreat into formalism and the rote application of *per se* rules—"anodynes for the pain of reasoning"—are not substitutes for the hard job of judging cases.

[11] *Oregon v. Elstad*, 470 U.S. 248 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971).

III.

THE LOWER COURT'S CONFECTION OF A SWEEPING PRIVILEGE AGAINST SELF-INCRIMINATION IN THE SETTING OF NON-INVESTIGATIVE CUSTODY PUTS THE FIFTH AMENDMENT INTO ASYMMETRY WITH THIS COURT'S APPLICATION OF THE FIRST, FOURTH, SIXTH, AND FOURTEENTH AMENDMENTS IN THE SAME SETTING.

Although prison gates do not lock out the United States Constitution, this Court has acknowledged that "imprisonment carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). In *Hudson*, *supra*, 468 U.S. at 526, for example, the Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches and seizures does not apply within the confines of the prison cell."

Protections of the First and Fourteenth Amendments have been held to avail in prison settings, as in *Procunier v. Martinez*, 416 U.S. 396 (1974), where regulations governing prisoner correspondence touching upon matters of religion and politics were struck down. But even there the Court declined to apply the standard of "strict scrutiny" with which it would test such governmental activity in society at large, and instead it examined prison rules—even in matters as sensitive as religious and political expression—against the yardstick of "reasonableness".

Thus, in *Pell v. Procunier*, 417 U.S. 817 (1974), the Court upheld prison rules prohibiting inmates from giving news media interviews inside the institution. In *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977),

the Court refused to overturn bans imposed by prison administrators against union meetings and bulk mail union solicitations. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court sustained security rules that prohibited inmates from receiving hardback books unless they were shipped directly from publishers, bookstores, or book clubs. In *Block v. Rutherford*, 468 U.S. 576 (1984), the Court reviewed and approved the constitutional validity of prison rules barring physical contact between prisoners and their visitors. In *Turner v. Safley*, 482 U.S. 78 (1987), the Court upheld regulations on prisoners' outside correspondence. And in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Court sustained a prison regimen notwithstanding the fact that it limited the ability of Moslem inmates to take part in weekly religious ceremonies.

Similarly, in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) this Court found no infringement of the right to counsel guaranteed by the Sixth Amendment where, after an accused's arraignment, a police informant sharing his cell listened to and reported his incriminating statements. The Court's approval of the informant's evidence in *Kuhlmann* is all the more striking in that, although it did not involve interrogative custody, neither did it arise in the context of post-conviction correctional custody.

Cases such as these evidence this Court's understanding that the places in which suspects and criminals are held, not for interrogation but for custody or correction, are a universe apart from normal society. Their populations contain high concentrations of the wicked and violent.

Sound, constitutional management of prisons, therefore, may well include even the "complete withdrawal of certain rights", *Hudson*, *supra*, 468 U.S. at 524, if "justified by considerations underlying our penal system." *Price v.*

Johnston, 334 U.S. 266, 285 (1948). As it was put in *Hudson*, *supra*, 468 U.S. at 524, "[t]he curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, *Wolff v. McDonnell* [418 U.S. 539, 555 (1974)], chief among which is internal security. . . ."

The realities of prison life continue to justify the constraints on liberty that this Court has acknowledged as appropriate. Just as the peculiar circumstances of correctional, as opposed to interrogative, custody entail special applications of the First, Fourth, Sixth, and Fourteenth Amendments, so is a distinct—and limited—application of the Fifth Amendment warranted in the same context. Just as prisoners have no justifiable expectations of privacy in their cells, so they have virtually no legitimate expectations of privacy in their uncoerced custodial conversations. They have no privilege in communication with fellow inmates, or with persons they believe to be their fellow inmates. They have every right to be free from coerced confessions, but no entitlement to blanket insulation of intramural conversations from use in evidence.

CONCLUSION

When Perkins incriminated himself he was in jail, but he was not undergoing "custodial police interrogation". *Miranda* simply does not apply. Perkin's statements were entirely uncoerced and uncompelled. Therefore the State committed no transgression against the strictures of the Fifth Amendment which, in any event, should confer no special privilege upon intramural communications by prisoners held in non-interrogative custody. Blanket prohibition of the use of informants and undercover agents in prison populations would do nothing to protect the right against self-incrimination. It would, however, demarcate the end of imprisonment as a noble experiment in correction and the perfection of its transformation into a Hobbesian hell, a war of everyone against everyone—inmates, guards, and staff—unfortunate enough to be found within prison walls. The judgment of the court below should be reversed.

Respectfully submitted,

JOSEPH A. MORRIS,
The Lincoln Legal Foundation,*
100 West Monroe Street,
Suite 1600,
Chicago, Illinois 60603,
(312) 606-0951,

Counsel of Record for Amici.

(Additional Counsel listed on following page)

* The Foundation gratefully acknowledges the assistance of DAVID R. MCCOURT, a non-attorney legal scholar, in the preparation of this brief.

(Additional Counsel for Amici)

DONALD D. BERNARDI,
State's Attorney of Livingston County, Illinois,
Livingston County Courthouse,
Pontiac, Illinois 61764,
(815) 842-1550,

FRED L. FOREMAN,
State's Attorney of Lake County, Illinois, and
Chairman, National District Attorneys Association,
Lake County Courthouse,
Waukegan, Illinois 60085,
(708) 360-6644,

DANIEL M. HARROD,
Counsel to the Illinois Sheriffs Association,
107 East Eureka Street,
Eureka, Illinois 61530,
(309) 467-2381,

NANCY W. OWEN,
State's Attorney of Coles County, Illinois, and
President, Illinois State's Attorneys Association,
Coles County Courthouse,
Charleston, Illinois 61920,
(217) 348-0561,

JACK E. YELVERTON,
National District Attorneys Association,
1033 North Fairfax Street,
Alexandria, Virginia 22314,
(703) 549-9222,

Of Counsel.

November 16, 1989.